MANI MARAN ATHIGHAREE v. PP

HIGH COURT MALAYA, PULAU PINANG
AHMAD SHAHRIR MOHD SALLEH JC
[CRIMINAL APPEAL NO: 41H-16-04-2016]
2 JUNE 2017

CRIMINAL LAW: *Penal Code – Section 323 read together with s. 326A – Plea of guilt – Whether nature and consequence of plea of guilt explained to accused – Magistrate sentenced accused to 12 months imprisonment – Whether term of imprisonment meted out must be two years and not 12 months – Whether conviction safe – Penal Code, ss. s. 323 read together with s. 326A*

The appellant was charged under s. 323 read together with s. 326A of the Penal Code ('PC') for causing hurt to his wife. The appellant pleaded guilty to the charge. In her grounds of judgment, the Magistrate ('Mg') said that the appellant's plea had been explained to the appellant. The explanation was that the sentence under s. 326A of the PC is imprisonment for a term which may extend to two years. After considering the mitigating and aggravating factors, the Mg decided that the appellant should be given credit for his guilty plea and therefore should not be given the maximum imprisonment term of two years. The Mg then sentenced the appellant to 12 months imprisonment from the date of his arrest. Aggrieved, the appellant appealed to the High Court. The issue that arose for determination was whether the Mg had addressed her mind to the correct interpretation of the law when the nature and consequence of the plea of guilt was purportedly explained to the appellant, if the Mg had not, what was the consequence of a plea of guilty when the plea of guilt made by the appellant was based on an explanation of the nature and consequence of a plea which was misconstrued.

Held (allowing appeal; setting aside conviction and sentence):

(1) The Mg made it clear that she had directed her mind to the fact that the appellant shall be punished with imprisonment which may extend to two years. Although the Mg had explained to the appellant the nature and consequences of the guilty plea, the fact that the Mg seemed to have taken the position that the sentence of imprisonment under s. 326A of the PC is not mandatory, warranted this court to exercise its revisionary powers to prevent injustice. (paras 10 & 13)

(2) In order to give effect to s. 326A of the PC, one just needs to apply the term of imprisonment specified, namely, 'twice as long'. Therefore, it is clear that the maximum term of imprisonment which may be imposed on the appellant if he was convicted under s. 323 of the PC is one year, it follows therefore, by mathematical formula, that the mandatory term of imprisonment under s. 326A of the PC in respect of offences under s. 323 shall be two years. (para 24)

(3) Although the Mg in her grounds of judgment stated that she directed her mind to the term of imprisonment provided under s. 326A of the PC, based on the sentence of 12 months imposed by the Mg, the nature and consequence of the appellant's plea had not been correctly explained. Had it been correctly explained, the sentence of imprisonment meted out by the Mg must be 24 months and could not have been 12 months. Therefore, the conviction of the appellant on his guilty plea was unsafe. The conviction and sentence was thus set aside and the case was ordered to be retried before another Mg. (paras 26 & 27)

Case(s) referred to:
Bachik Abdul Rahman v. PP [2004] 2 CLJ 572 CA ***(refd)***
Gabriel v. PP [1991] 1 LNS 44 HC ***(refd)***
Lee Weng Tuck & Anor v. PP [1989] 2 CLJ 120; [1989] 1 CLJ (Rep) 75 SC ***(refd)***
Mohammad Hassan v. PP [1997] 1 CLJ Supp 485 HC ***(refd)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***
Phillip Lau Chee Heng v. PP [1988] 2 CLJ 873; [1988] 2 CLJ (Rep) 144 HC ***(refd)***
PP v. Kamal Hisham Ja'afar [2016] 1 CLJ 303 HC ***(refd)***
PP v. Man Ismail [1938] 1 LNS 54 HC ***(refd)***
PP v. Mohd Tajuddin Ahmad [1997] 1 CLJ Supp 384 HC ***(refd)***
PP v. Sa'ari Jusoh [2007] 2 CLJ 197 FC ***(refd)***
PP v. Tan Tatt Eek & Other Appeals [2005] 1 CLJ 713 FC ***(refd)***
Zaidon Shariff v. PP [1996] 4 CLJ 441 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 173(a), (b), 305
Dangerous Drugs Act 1952, s. 37(d), (da)
Interpretation Acts 1948 and 1967, s. 19(1)
Penal Code, ss. 323, 326A, 376

Other source(s) referred to:
Bindra's Interpretation of Statutes, 9th edn, pp 334-335

For the appellant - Anthonysamy Selvanaikam; M/s Aziz Anthony & Co
For the respondent - Lim Cheah Yit; DPP

[Editor's note: Appeal from Magistrate's Court, Bukit Mertajam; Arrest Case No: 83-379-03-2016 (set aside).]

Reported by Sandra Gabriel

JUDGMENT

Ahmad Shahrir Mohd Salleh JC:

Background

[1] This is an appeal on sentence after the appellant pleaded guilty to the charge. In the Bukit Mertajam Magistrate's Court, the appellant was charged under s. 323 read together with s. 326A of the Penal Code for causing hurt to his wife. The charge against the appellant reads:

Bahawa kamu pada 20.03.2016 jam lebih kurang pukul 8:30 malam di rumah No. 18, Lorong Sembilang 3, Seberang Jaya, di dalam Daerah Seberang Perai Tengah, di dalam negeri Pulau Pinang, dengan sengaja telah mendatangkan cedera terhadap isteri kamu iaitu Veerakumary a/p Kaliappan, No. KP: 780125-02-5714. Oleh yang demikian, kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 323 Kanun Keseksaan dan dibacakan bersama dengan Seksyen 326A Kanun Keseksaan.

[2] Based on his guilty plea, the appellant was sentenced to 12 months imprisonment from the date of his arrest. The appellant is not satisfied with the sentence and appeals to this court.

Facts Of The Case

[3] In his plea of guilty, the appellant admitted to the facts of the case which was tendered by the prosecution and marked as exh. P1. The facts of the case which appear at p. 1 of the appeal record (vol. 3) read like this:

1. Pada 20/03/2016 jam lebih kurang 2030hrs semasa pengadu nama: Veerakumary a/p Kaliappan berada di rumah alamat No. 18, Lorong Sembilang 3, Seberang Jaya, Pulau Pinang, pengadu: Veerakumary a/p Kaliappan telah bertengkar dengan OKT nama: Manimaran a/l Athigaree kerana OKT nama: Manimaran a/l Athigaree sering mabuk. OKT nama: Manimaran a/l Athigaree telah menyimbah cecair ke badan pengadu: Veerakumary a/p Kaliappan sehingga menyebabkan leher pengadu: Veerakumary a/p Kaliappan melecur. Pengadu: Veerakumary a/p Kaliappan telah keluar dari rumah dan pergi ke rumah jiran minta perlindungan. Laporan polis dibuat pengadu: Veerakumary a/p Kaliappan Seberang Jaya Report: 2680/16
2. Anggota Tangkapan (A2) dari Balai Polis Seberang Jaya, Pulau Pinang telah buat tangkapan ke atas OKT: Manimaran a/l Athigaree kerana bersangkut dengan Seberang Jaya Report: 2680/16, Seksyen 324 Kanun Keseksaan.

   Laporan polis tangkapan Seberang Jaya Report: 2698/16.
3. Siasatan dijalankan oleh Inspektor Harul Hartini Binti Hairuddin.
4. Berdasarkan kepada keterangan pengadu: Veerakumary a/p Kaliappan dan berdasarkan gambar kecederaan, dengan ini mendapati OKT: Manimaran a/l Athigaree telah melakukan kesalahan di bawah Seksyen 323 Kanun Keseksaan dibaca bersama Seksyen 326A Kanun Keseksaan.

   P1 – Fakta kes

   P2 – Salinan Seberang Jaya/2680/16

   P3 – Salinan Seberang Jaya/2698/16

   P4 – Gambar kecederaan

   P5 – Salinan sijil perkahwinan.

Findings Of Magistrate

[4] In recording the appellant's plea of guilty and passing the sentence, the learned Magistrate's record of proceedings, at pp. 1-3 of the appeal record (vol. 2), reads as follows (*verbatim*):

Timb. Pendakwaraya:

Pohon pertuduhan dibacakan kepada OKT,

Mahkamah:

Pertuduhan dibacakan dan diterangkan kepada OKT dalam bahasa Malaysia. OKT faham pertuduhan dan mengaku salah. Sifat dan akibat pengakuan salah serta penalti diterangkan, OKT faham dan masih mengaku salah. OKT faham sifat dan akibat pengakuan salah serta hukuman.

Timb. Pendakwaraya:

Dikemukakan fakta kes dan Pohon dibacakan kepada OKT.

Mahkamah:

Fakta kes	P1
(Fakta kes dibaca dan diterangkan kepada OKT dalam bahasa Malaysia. OKT faham dan akui sebagai benar)	
Seberang Jaya Report 2680/16	P2
Seberang Jaya Report 2698/16	P3
6 keping gambar mangsa dan kecederaan (P4A-F dicamkan dan diakui benar oleh OKT)	P4A-F
Daftar perkahwinan	P5

Mahkamah:

Berpuas hati. Pengakuan salah OKT diterima dan direkodkan. OKT didapati bersalah sebagaimana pertuduhan.

Peguambela:

OKT berumur 40 tahun. OKT mempunyai 4 orang anak. Pohon untuk mengambil kira bahawa pengakuan salah OKT telah menjimatkan masa dan kos semua pihak. OKT telah insaf dan berjanji tidak akan mengulangi kesalahan ini lagi. Pohon penjara yang paling minima dikenakan terhadap OKT.

Timb. Pendakwaraya:

OKT tiada rekod lampau. Walau bagaimana pun, pohon hukuman berat sebagai pengajaran. Pohon juga mengambil kira kepentingan awam dan kekerapan kes. Seksyen 323 dibaca bersama Seksyen 326A Penal Code memperuntukkan hukuman yang lebih berat jika kesalahan antara suami isteri semasa wujudnya perkahwinan yang sah. Ianya dimasukkan untuk menunjukkan keseriusan kerajaan untuk menangani isu-isu seperti ini yang semakin berat. Pohon hukuman yang dapat menunjukkan keseriusan Mahkamah. Kecederaan seperti dalam gambar P4A-F. OKT telah dengan sengaja menyimbah hingga melecur. Pohon ambil kira keseriusan ini. Pohon hukuman berbentuk pengajaran bukan sahaja kepada OKT supaya tidak ulang malah kepada orang awam.

Mahkamah:

OKT didapati bersalah dan disabitkan atas pertuduhan dan hukuman. OKT dijatuhkan hukuman 12 bulan penjara dari tarikh OKT ditangkap (21/3/2016).

T.T: Diannee Ningrad Binti Nor Azahar

[5] In her grounds of judgment, at p. 17 of the appeal record (vol. 1), the learned Magistrate said that the nature and consequences of the appellant's plea has been explained to the appellant. The explanation was that the sentence under s. 326A of the Penal Code is "penjara yang boleh sampai dua tahun" which is translated as "imprisonment for a term which may extend to two years". The learned Magistrate also made it clear that she has directed her mind to the fact that the term of imprisonment for which the appellant is subject to is imprisonment for a term which may extend to two years.

[6] After considering the mitigating and aggravating factors, the learned Magistrate referred to the cases of *Bachik Abdul Rahman v. PP* [2004] 2 CLJ 572 and *Zaidon Shariff v. PP* [1996] 4 CLJ 441 and decided that the appellant should be given credit for his plea of guilty and therefore should not be given the maximum imprisonment term of two years if the trial had proceeded and the appellant is convicted.

[7] In the last part of her judgment at p. 22 of the appeal record, the learned Magistrate made an *obiter* remarks that the High Court should attempt to interpret the meaning of s. 326A of the Penal Code to eliminate the confusion currently prevailing at the Magistrate's courts involving offences of the same nature.

Should This Court Exercise Its Revisionary Powers?

Court Must Ascertain That The Appellant Understands The Nature And Consequences Of The Guilty Plea

[8] The appellant in this case pleaded guilty to the charge. Pursuant to s. 305 of the Criminal Procedure Code, a plea of guilty limits the right of an accused to appeal in respect of extent or legality of sentence. In the

circumstances, in deciding whether this court should exercise its revisionary powers, this court is guided by a few authorities on point. In *PP v. Kamal Hisham Ja'afar* [2016] 1 CLJ 303 HC, His Lordship the High Court Judge made the following observations:

> [19] The great author of '*Mallal's Criminal Procedure'* the late Mr. Bashir Mallal had described the object of the revisional legislation found in Chapter XXXI of the Criminal Procedure Code is 'to confer upon the High Court a kind of paternal or supervisory jurisdiction in order to correct miscarriage of justice arising from misconception of law, irregularity of procedure, neglect of proper precautions or apparent hardship of treatment, which has resulted on the one hand in some injury to the due maintenance of law and order or on the other hand undeserved hardship to individuals.
>
> [20] The general supervisory and revisionary jurisdiction of the High Court is further encapsulated in s. 35 of the Courts of Judicature Act 1964 which states as follows:
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> > 35(1) In addition to the powers conferred on the High Court by this or any other written law, the High Court shall have the general supervisory and revisionary jurisdiction over all subordinate courts, and may in particular, but without prejudice to the generality of the foregoing provision, if it appears desirable in the interests of justice, either of its own motion or at the instance of any party or persons interested, at any stage in any matter or proceeding, whether civil or criminal, in any subordinate court, call for the record thereof, and may remove the same into the High Court or may give to the subordinate court such directions as to the further conduct of the same as justice may require.
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> [21] It could be observed that the power of the High Court in acting in revision are wider in scope than its powers on appeal. The court in the instant case has acted on its own motion to call and examine the record of proceedings of the Sessions Court in granting bail to the respondent. Both parties in the proceedings are in unison that the powers of the High Court in revision are exercisable at the discretion of the court and that discretion is untrammeled and free so as to be fairly exercised according to the exigencies of each case. (see: *Re Soo Leot* [1955] 1 LNS 127; [1956] MLJ 54). Being discretionary in nature, it must be exercised judicially and within the limits and in the spirit of the legislation and it should be exercised for the purposes of correcting a miscarriage of justice. (see: *Liaw Kwai Wah & Anor v. PP* [1987] 1 CLJ 35; [1987] CLJ (Rep) 163; [1987] 2 MLJ 69 SC).

[9] In the case of *Mohammad Hassan v. Public Prosecutor* [1997] 1 CLJ Supp 485, His Lordship Augustine Paul J (as he then was) decided that although a plea of guilty limits the accused's right of appeal as aforesaid, the accused is not prevented to request the court to exercise its powers of

revision at the hearing of the appeal and the court could, if appropriate, exercise its powers of revision. Similarly, in the present appeal, this court as the appellate court is entitled to look into the record and exercise its power of revision if the record shows that a failure of justice has been occasioned.

[10] After evaluating the appeal record, I find that the learned Magistrate made it clear at pp. 17 and 18 of the appeal record (vol. 1) that she has directed her mind to the fact that the appellant shall be punished with imprisonment **which may extend to two years** (emphasis added). The question is, has the learned Magistrate addressed her mind to the correct interpretation of the law when the nature and consequences of the plea of guilty was purportedly explained to the appellant? And if she has not, what is then the effect to the plea of guilty when the plea of guilty made by the appellant was based on an explanation of the nature and consequences of the plea which is misconstrued?

[11] The provisions relating to summary trials are contained in s. 173 of the Criminal Procedure Code. The pertinent provisions in this regard would be ss. 173(a) and (b) which read as follows:

> **Procedure in summary trials**
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> 173. The following procedure shall be observed by Magistrates in summary trials:
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> (a) When the accused appears or is brought before the Court a charge containing the particulars of the offence of which he is accused shall be framed and read and explained to him, and he shall be asked whether he is guilty of the offence charged or claims to be tried.
>
> (b) If the accused pleads guilty to the charge, whether as originally framed or as amended, the plea shall be recorded and he may be convicted on it and the Court shall pass sentence according to law:
>
> Provided that before a plea of guilty is recorded the Court shall ascertain that the accused understands the nature and consequences of his plea and intends to admit, without qualification, the offence alleged against him.

[12] What is the effect on the plea of guilty if the provisions of s. 173(a) and (b) of the Criminal Procedure Code have not been correctly applied? In the case of *Lee Weng Tuck & Anor. v. Public Prosecutor* [1989] 2 CLJ 120; [1989] 1 CLJ (Rep) 75 SC, the Supreme Court held *inter alia* that if the proper safeguards under s. 173(b) of the Criminal Procedure Code were not addressed, it would render the plea of guilty invalid. His Lordship Mohd Azmi SCJ at p. 81 states that:

A plea of guilty must be valid and unequivocal, and in order to determine the validity of a plea of guilty, the safeguards which must be followed might be stated as follows:

(1) The Court must ensure that it is the accused himself who wishes to plead guilty. Thus in *Rex v. Tan Thian Chai & Anor*. [1932] MLJ 74, Whitley J held that an accused person should plead guilty or claim to tried by his own mouth and not through his Counsel.

(ii) The Court must ascertain that the accused understands the nature and consequences of his plea.

(iii) The Court must ascertain that the accused intends to admit without qualification the offence alleged against him.

Thus, it is insufficient that the plea of guilty under safeguard (i) is unequivocal if the other safeguards are not complied with.

[13] In the present appeal, although the record of proceedings show that the learned Magistrate has explained to the appellant the nature and consequences of the plea of guilty, the fact that the learned Magistrate seemed to have taken the position that the sentence of imprisonment under s. 326A of the Penal Code is not mandatory, warrant this court to exercise its revisionary powers to prevent injustice.

Analysis And Decision Of This Court

Does s. 326A Of The Penal Code Impose A Mandatory Term Of Imprisonment?

[14] First, it is necessary to determine if s. 326A of the Penal Code imposes a mandatory sentence. If so, what is the mandatory sentence imposed by s. 326A if the offence is one which falls under s. 323 of the Penal Code?

Section 323 of the Penal Code reads as follows:

Punishment for voluntarily causing hurt

323. Whoever, except in the case provided for by section 334, voluntarily causes hurt, shall be punished with imprisonment for a term which may extend to one year or with fine which may extend to two thousand ringgit or with both.

Section 326A of the Penal Code reads as follows:

Punishment for causing hurt by spouse

326A. Whoever, during the subsistence of a valid marriage, causes hurt to his spouse and commits an offence under section 323, 324, 325, 326, 334 or 335 shall be punished with imprisonment for a term of twice as long as the maximum term for which he would have been liable on conviction for that offence under the relevant section.

[15] Section 326A of the Penal Code was inserted *vide* Penal Code (Amendment) Act 2014 (Act A1471). It was published in the *Gazette* on 30 December 2014. In the absence of any provision on commencement date in the amending Act and by virtue of s. 19(1) of the Interpretation Acts 1948 and 1967, it came into effect on 31 December 2014. The offence with which the appellant was charged was committed on 20 March 2016.

[16] Before I proceed further, it is a useful reminder to reflect on the basic principles in interpretation of statutes, especially the ones which relate to penal legislation. In deciding on issues relating to the application of presumptions under s. 37(d) and (da) of the Dangerous Drugs Act 1952, His Lordship Chong Siew Fai CJ (Sabah & Sarawak) (as he then was) in the case of *Muhammed Hassan v. Public Prosecutor* [1998] 2 CLJ 170 FC, remarked at p. 195 that "... general principles of construction of statutes including that penal enactments are to be construed strictly and that words in a statute that are plain and unambiguous are to be given their plain, ordinary and common usage meaning." In the case of *Public Prosecutor v. Sa'ari bin Jusoh* [2007] 2 CLJ 197 FC, His Lordship Augustine Paul FCJ (as he then was) quoted *Bindra's Interpretation of Statutes,* 9th edn, which says at pp. 334-335 that:

> The strict construction of a criminal statute does not mean such construction of it as to deprive it of the meaning intended. Penal statutes must be construed in the sense that best harmonises with their intent and purpose. The more correct version of the doctrine appears to be that statutes of this class are to be fairly construed and faithfully applied according to the intent of the legislature, without unwarrantable severity on the one hand or unjustifiable levity on the other, in cases of doubt the courts inclining to mercy. **A penal statute has, no doubt, to be construed strictly, but the intention of the legislature must govern in the construction of a penal statute as much as any other statute.** (emphasis added).

[17] In the case of *Public Prosecutor v. Tan Tatt Eek & Other Appeals* [2005] 1 CLJ 713 FC, the decision of the majority in holding, *inter alia*, that a penal statute requires a strict construction, was of the following view:

> The primary duty of a court is to give effect to the intention of the Legislature in the words used by it and no outside consideration can be called in aid to find another intention (*Nathu Prasad v. Singhai Kapurchand* [1976] JLK 340). It is a well established canon of interpretation that the intent of the Legislature is to be gathered from the words used (*Secretary to Government, Punjab Revenue v. Jagar Singh* [1977] Rev LR 104) and that if the words used have not acquired any technical meaning they should be deemed to have been used in their ordinary meaning (*SS Harishchandra Jain v. Capt Inder Singh* [1977] JLJ 312.

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> Thus when the words of a statute are clear, plain and unambiguous, that is to say, they are reasonably susceptible to only one meaning, the courts are bound to give effect to that meaning irrespective of the consequences (as *Nelson Motis v. Union of India* AIR [1992] SC (1981). As Tindal CJ said in the *Sussex Peerage Case* [1844] 11 Cl &F85 at p 143:

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> If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves do alone in such cases best declare the intent of the lawgiver.

[18] In attempting to elucidate the intention of Parliament in a particular statute, the Hansard would be a useful aid to interpretation and especially helpful if the wordings of the particular statute are not clear. Where the wordings of a particular statute is clear, it is most desirable to keep to those wordings to avoid any unnecessary import in interpretation. The Legislature is presumed to have intended the natural meaning of each word employed in the statute which it legislates and the duty of the courts is to interpret and apply the law as they are.

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D

[19] The learned Magistrate in her judgment quoted an excerpt of the Hansard dated 22 October 2013 at pp. 110 and 115 in *verbatim*. I find that it is evident from the Hansard that the Legislature had indeed intended to make the term of imprisonment under amended s. 326A mandatory.

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[20] The intention of Legislature is manifested, not secreted. The role of courts is merely to interpret the statutes and not to read between the lines or give a meaning which is clearly not envisaged by the clear words of the statute itself especially in the realm of criminal law.

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[21] In the case of *Public Prosecutor v. Mohd Tajuddin Ahmad* [1997] 1 CLJ Supp 384, His Lordship, Mohd Noor Abdullah Jr (as he then was) had the occasion to deal with both "shall be punished with" and "shall be liable to" expressions appearing in s. 376 of the Penal Code. In deciding that the expression "shall be punished with" connotes a mandatory meaning, His Lordship said at p. 387:

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> The legislature has varying modes of indicating in any penal provision the type and extent of punishment to be meted out, whether an imprisonment or a fine or whipping or any combination. It also indicates its intention whether a particular sentence is mandatory or discretionary by the use of expressions such as "shall be punished with" or "shall be liable to", **the former being mandatory** (emphasis added) and the latter discretionary.

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[22] Other cases have also established that the words "shall be punished with" are mandatory in nature. (See: *Gabriel v. PP* [1991] 1 LNS 44; [1992] 1 MLJ 593, *Philip Lau Chee Heng v. PP* [1988] 2 CLJ 873; [1988] 2 CLJ (Rep) 144; [1988] 3 MLJ 107 and *PP v. Man bin Ismail* [1938] 1 LNS 54; [1939] 8 MLJ (FMSR) 207).

I

[23] In interpreting s. 326A of the Penal Code, I find that the first part of that section describes the nature of the penalty. The words, "... shall be punished with imprisonment ..." clearly means that imprisonment under s. 326A of the Penal Code is mandatory. I am fortified in my view based on the aforesaid reasons.

What Is The Mandatory Term Of Imprisonment Under s. 326A Of The Penal Code If The Offence Falls Under s. 323?

[24] What then is the term for the mandatory imprisonment under s. 326A of the Penal Code where the offence is one under s. 323? I would attempt the poser like this. What is the maximum term the appellant would have been liable to on conviction for an offence under s. 323 of the Penal Code? In other words, what is the maximum term which may be imposed on the appellant if he is convicted under s. 323 of the Penal Code? In order to give effect to s. 326A of the Penal Code, one just need to apply the term of imprisonment specified, namely, "twice as long". It is clear that the maximum term of imprisonment which may be imposed on the appellant if he is convicted under s. 323 of the Penal Code is one year. It follows therefore by simple mathematical formula that the mandatory term of imprisonment under s. 326A of the Penal Code in respect of offences under s. 323 shall be two years.

Has The Nature And Consequences Of The Plea Been Correctly Explained To The Appellant?

[25] After determining that the sentence of imprisonment under s. 326A of the Penal Code in respect of offences under s. 323 is a mandatory imprisonment of two years, it is necessary to examine if the learned Magistrate has in fact correctly explained to the appellant the nature and consequences of the guilty plea.

[26] Although the learned Magistrate in her grounds of judgment states that she had directed her mind to the term of imprisonment provided under s. 326A of the Penal Code, based on the sentence of 12 months imposed by the learned Magistrate for the offence under s. 323 read together with s. 326A of the Penal Code, I am of the view that the nature and consequences of the appellant's plea has not been correctly explained. If in fact it had been so correctly explained, the sentence of imprisonment meted out by the learned Magistrate must be 24 months and it could not have been 12 months.

Conclusion

[27] In the circumstances and as a result of the analysis, I do not find it necessary to further examine other arguments put forward. The conviction of the appellant on his guilty plea is unsafe and is hereby set aside. The appeal is hereby allowed. The conviction and sentence is set aside and a retrial is ordered forthwith before another Magistrate.

The matter is forthwith fixed for case management today (2 June 2017) at 3pm before another Magistrate at Bukit Mertajam.

Post-Script

Section 326A of the Penal Code was re-amended again *vide* Penal Code (Amendment) Act 2017 (Act 1536) which was published in the *Gazette* on 2 June 2017. The amending Act provides for its commencement on a date to be appointed by the Minister by notification in the *Gazette*. However, as of the date of this judgment, the amendment has yet to be made effective.